(2)

Supreme Court, U.S.
FILED
DEC 2 1997
CLERK

No. 97-584

In The

Supreme Court of the United States

October Term, 1997

LEMUEL H. COX,

Petitioner,

vs.

GUILFORD COUNTY BOARD OF EDUCATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JILL R. WILSON
BROOKS, PIERCE, McLENDON, HUMPHREY & LEONARD, L.L.P.
P.O. Box 26000
Greensboro, NC 27420
(910) 373-8850

JIM D. COOLEY
Counsel of Record
PATRICIA E. DOWDS
WOMBLE CARLYLE SANDRIDGE & RICE, P.L.L.C
3300 One First Union Center
301 South College Street
Charlotte, NC 28202-6025
(704) 331-4900

Attorneys for Respondent

72548 (800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21 Lutz Appellate Services, inc.

888

QUESTIONS PRESENTED

Whether the decisions of the lower courts conflict with *St. Mary's Honor Center v. Hicks*.

Whether the District Court properly held that Petitioner failed to present evidence of pretext to survive summary judgment.

STATEMENT OF THE CASE[1]

The Respondent Guilford County Board of Education (hereafter "Respondent") disagrees with several factual allegations set forth by Petitioner Lemuel Cox (hereafter "Petitioner") in his statement of the case and argument. Instead of including a lengthy recitation of the facts in its brief, Respondent refers the Court to the statement of facts contained in the District Court's Memorandum Opinion. (Petitioner's Appendix, p. 4a, *et seq.*)

Petitioner filed this action in the United States District Court for the Middle District of North Carolina on September 21, 1995, against the Guilford County Board of Education and Associate Superintendent John Wright, alleging violation of the Age Discrimination in Employment Act ("ADEA") and wrongful discharge in violation of North Carolina General Statute § 143-422.2.[2] On June 20, 1996, the court dismissed with prejudice all claims against John Wright. Petitioner did not appeal from that order. The parties filed cross motions for summary judgment on July 10, 1996. On December 10, 1996, the District Court granted Respondent's motion for summary judgment and denied Petitioner's motion for summary judgment. Petitioner appealed that decision to the United States Court of Appeals for the Fourth Circuit. The case was argued before the Fourth Circuit on June 6, 1997. The Fourth Circuit affirmed the District Court's decision by an unpublished per curiam opinion filed July 1, 1997.

---

1. The Respondent is satisfied with the Petitioners' citations of reports of the opinions entered by courts below, jurisdictional statement and list of statutory provisions. The Respondent has elected pursuant to Supreme Court Rule 24.2 not to include these items in its brief.

2. Petitioner's claim under N.C. Gen. Stat. § 143-422.2 is subject to the same analysis as an ADEA wrongful discharge claim. *Robinson v. Ladd Furniture, Inc.*, 872 F. Supp. 248, 253 (M.D.N.C. 1994).

REASONS FOR DENYING THE WRIT

I. THE LOWER COURT DECISIONS DO NOT CONFLICT WITH *ST. MARY'S HONOR CENTER v. HICKS*.

Petitioner contends that the Fourth Circuit Court of Appeals has misinterpreted this Court's holding in *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S. Ct. 2742, 125 L. Ed. 2d 407 (1993), by requiring a plaintiff not only to disprove the legitimate non-discriminatory reason offered by the employer, but also to prove that discrimination was the real reason for the employer's decision. As the Court is fully aware, this is precisely what *Hicks* does hold, and *Hicks* does not depart from the firmly established case law regarding the proof scheme for employment discrimination cases, as set forth in *McDonnell Douglas v. Green*, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973), and *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). It is Petitioner who has misinterpreted the holding in *Hicks*. Petitioner argues that *Hicks* and *Burdine* stand for the position that a plaintiff satisfies his burden of proof by merely producing evidence that the employer's proffered reason was false. In support, Petitioner selectively quotes *Hicks* out of context. On page 8 of his Petition for Certiorari, Petitioner quotes *Hicks*, 113 S. Ct. at 2752, "we must agree with the dissent on this one: The words [of *Burdine*] bear no other meaning but that the falsity of the employer's explanation is alone enough to compel judgment for the plaintiff." Petitioner contends that this passage shows that a plaintiff need not prove that discrimination was the real reason behind an employer's decision. What Petitioner fails to note is that *Hicks* goes on to state that the quoted passage of *Burdine* is problematic since it contradicts the very holding in *Burdine*, as well as other case law, including *McDonnell Douglas*. *Hicks*, 509 U.S. at 517, 113 S. Ct. at 2752-2753.

The true holding of *Hicks* is clear. "The ultimate burden of

persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Hicks*, 509 U.S. at 507, 113 S. Ct. at 2747 (quoting *Burdine*, 450 U.S. at 253, 101 S. Ct. at 1093). Once the defendant produces evidence of a legitimate, non-discriminatory reason for its decision, "the presumption raised by the prima facie case is rebutted, and drops from the case." *Id.* Plaintiff then must show "that the proffered reason was not the true reason for the employment decision and that race was." *Id.* "It is not enough, in other words, to *dis*believe the employer; the factfinder must *believe* the plaintiff's explanation of intentional discrimination." *Id.* 509 U.S. at 519, 113 S. Ct. at 2754 (emphasis original). When deciding this case, the Fourth Circuit and District Court correctly applied *Hicks* by requiring Petitioner to show both that Respondent's reason for not hiring him was false and that his age was the real reason behind the decision. The courts did not require Petitioner to satisfy any higher burden of proof than the case law requires.[3]

II. THE DISTRICT COURT PROPERLY HELD THAT PETITIONER FAILED TO PRESENT EVIDENCE OF PRETEXT TO SURVIVE SUMMARY JUDGMENT.

It is undisputed that Respondent set forth a legitimate, non-discriminatory reason for its employment decision: the hiring committee believed that the selected candidate (Ms. Bergeron) was more qualified for the position than Petitioner. The District Court properly applied Fourth Circuit precedent and held that "where the non-discriminatory reasons proffered by the employer concern the relative qualifications of the candidates, and the plaintiff cannot point to any evidence of discrimination, the plaintiff must establish that he was the better qualified candidate for the position sought"

---

3. In this case, however, it is of no significance whether Petitioner bears the burden of proving that discrimination was the real reason for Respondent's decision, since Petitioner failed to satisfy even the first prong of proving pretext, that the proffered reason was false. (Petitioner's Appendix, p. 16a).

to raise an inference of discrimination sufficient to survive summary judgment. (Petitioner's Appendix, p. 14a (citing *Evans v. Technologies Applications & Serv. Co.*, 80 F.3d 954, 960 (4th Cir. 1996))). In an attempt to support his claim that he was the better qualified candidate, Petitioner offered evidence of his educational background, number of years of experience, and favorable performance evaluations. Such evidence showed nothing more than the fact that he was qualified for the position, a point that Respondent has never disputed. It did not show that he was *more* qualified for the position than Ms. Bergeron. The only "evidence" of his superior qualifications was Petitioner's own unsubstantiated opinion, which the District Court held, and the Fourth Circuit affirmed, did not have sufficient probative force to create a genuine issue of material fact. (Petitioner's Appendix, p. 15a (citing *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230, 245 (4th Cir. 1982)). The hiring committee determined that Ms. Bergeron was the best qualified candidate for the position, and the District Court correctly noted that "while Cox believes that his thirty-two years of service made him more qualified, it is the perception of the decisionmaker which is relevant, not the plaintiff's perception of himself." (Petitioner's Appendix, p. 15a (quoting *Evans* 80 F.3d at 960-961)). Petitioner failed to produce any direct evidence of discrimination, and without evidence that he was, in fact, more qualified than Ms. Bergeron, Petitioner failed to produce evidence of pretext. The court did not disturb the committee's decision and dismissed Petitioner's claims of discrimination as a matter of law.

Petitioner apparently contends that by rejecting his personal opinion as to his qualifications for the position, and by accepting the hiring committee's decision, the Fourth Circuit and District Court resolved issues of fact and credibility in violation of Rule 56 of the Federal Rules of Civil Procedure, thus denying him his right to a jury trial. However, while all reasonable inferences are to be drawn in favor of the non-moving party, a plaintiff cannot survive summary judgment "through mere speculation or the building of one inference upon another." *O'Connor v. Consolidated Coin*

Caterers Corp., 56 F.3d 542, 545 (4th Cir. 1995), *rev'd on other grounds*, 116 S. Ct. 1307 (1996).

> When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts. In the language of the Rule, the non-moving party must come forward with "specific facts showing that there is a *genuine issue for trial.*" Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no "genuine issue for trial."

Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986). In this case, there were no issues of material fact to be resolved at trial, thus Petitioner was not denied his right to a jury trial.

CONCLUSION

The District Court engaged in an extensive and well-reasoned analysis of the evidence and rightfully concluded that Petitioner did not and could not satisfy his burden of proof. The Fourth Circuit agreed. The petition does not implicate any of the customary reasons set forth in Supreme Court Rule 10 for this Court to grant a writ of certiorari, such as a conflict with a decision of this Court. There is no evident reason to grant the writ of certiorari, and it should be denied.

Respectfully submitted,

JIM D. COOLEY
Counsel of Record
PATRICIA E. DOWDS
WOMBLE CARLYLE SANDRIDGE
& RICE, P.L.L.C
3300 One First Union Center
301 South College Street
Charlotte, NC 28202-6025
(704) 331-4900

JILL R. WILSON
BROOKS, PIERCE, McLENDON,
HUMPHREY & LEONARD, L.L.P.
P.O. Box 26000
Greensboro, NC 27420
(910) 373-8850

Attorneys for Respondent